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14 || Attorneys for Defendant
APPLE INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

18 || APPLE INC.

Plaintiff,

V.

21 WI-LAN INC.

Defendant.

CASE NO. 3:14-cv-02235-DMS-BLM
(lead case);
CASE NO. 3:14-cv-1507-DMS-BLM
(consolidated)

APPLE INC.'S OBJECTIONS TO DR. VIJAY MADISETTI'S OPINIONS

Dept.: 13A

Judge: Hon. Dana M. Sabraw

Magistrate Judge: Hon. Barbara L. Major

24 AND RELATED 25 COUNTERCLAIMS

1 In order to avoid disrupting the presentation of evidence at trial with multiple
 2 preservation objections, Apple Inc. (“Apple”) respectfully submits for the record
 3 the following written objections to certain testimony of Dr. Vijay Madisetti. As set
 4 forth in this Court’s New Trial Order (ECF No. 554), Order Denying Wi-LAN
 5 Inc.’s (“Wi-LAN”) Motion for Reconsideration (ECF No. 614), the Order Granting
 6 in Part and Denying In Part Apple’s Motion to Exclude The Testimony of Wi-
 7 LAN’s Experts (ECF No. 715) and as set forth in Apple’s briefing corresponding to
 8 these Orders and the arguments set forth by Apple in the Joint Request for
 9 Telephonic Status Conference (ECF No. 731), Apple objects to the testimony of Dr.
 10 Madisetti at the damages retrial in its entirety and any reliance by Wi-LAN’s
 11 damages expert, Mr. Kennedy, on any such testimony of Dr. Madisetti. Apple
 12 maintains that Dr. Madisetti should be excluded from this trial in its entirety, but, at
 13 a minimum, Dr. Madisetti’s testimony must be limited to the very narrow scope set
 14 forth by this Court, and nothing more: “the Court finds Dr. Madisetti may testify at
 15 the retrial in Wi-LAN’s case in chief on the issue of non-infringing alternatives.”
 16 ECF No. 770 at 2.¹ Specifically, Apple objects to the testimony of Dr. Madisetti on
 17 at least four grounds:

18 First, Dr. Madisetti’s “benefits” opinions have been excluded in their
 19 entirety, and Dr. Madisetti should be excluded from testifying about any benefits of
 20 the patents or any of the documents he relied upon in forming those unreliable
 21 opinions. *See* ECF No. 715 at 13 (“Wi-LAN’s benefits methodology is not reliable
 22 and was not reliably applied to the facts of this case. Accordingly, the Court grants
 23 Apple’s motion to exclude this methodology.”). Specifically, this Court found error
 24 with Dr. Madisetti’s opinions because “the problem here is Wi-LAN’s correlation
 25 of the benefits of its inventions with improved voice quality, either with VoLTE in
 26 general or under loading conditions in particular, without sufficient evidence to

27 ¹ As set forth below, Apple maintains its objection that any potential testimony
 28 from Dr. Madisetti regarding the “technological background” would be cumulative
 of Mr. Stanwood. *See* ECF No. 770 at 2.

1 support that correlation.” *Id.* at 12. This includes Dr. Madisetti’s opinions that Wi-
 2 LAN’s “inventions caused the improvements and benefits in voice quality *during*
 3 *loading*, but that assumption, too, is plagued by the same problems and concerns.”
 4 *Id.* at 13. Any remaining opinions Dr. Madisetti may have regarding the benefits of
 5 the asserted patents are inextricably connected to his excluded opinions and must be
 6 likewise excluded as unduly prejudicial under Federal Rule of Evidence 403.
 7 Indeed, only Mr. Kennedy was given leave to submit a supplemental expert report
 8 after this Court’s *Daubert* Order (ECF No. 715), and this Court has already held
 9 that Dr. Madisetti is limited at the retrial to testifying “on the issue of non-
 10 infringing alternatives.” ECF No. 770 at 2. Dr. Madisetti must be prohibited from
 11 referencing any testimony or opinion approaching the “benefits” of the patents or
 12 introducing into evidence or testifying about the numerous prejudicial and
 13 inextricably intertwined documents that Dr. Madisetti opined about at the 2018 trial
 14 with respect to his “benefits” opinions.

15 Second, Dr. Madisetti must be limited to testifying as to the sole remaining
 16 non-infringing alternative—3G circuit-switched calling—and must not be permitted
 17 to testify beyond the scope of that limited non-infringing alternative. Specifically,
 18 Dr. Madisetti should be excluded from testifying about the one-bus architecture or
 19 FaceTime Audio as a non-infringing alternative. Wi-LAN has agreed to refrain
 20 from introducing testimony on these specific non-infringing alternatives. *See* ECF
 21 No. 805 at 12 (“Apple requests that the Court preclude Wi-LAN from offering
 22 testimony regarding (1) Apple’s dropped non-infringing alternatives … Wi-LAN
 23 does not intend to introduce testimony regarding any of the above.”). Because
 24 Apple bears the burden of proof on non-infringing alternatives, and Apple’s only
 25 non-infringing alternative it is presenting at this damages retrial is 3G circuit-
 26 switched calling, Dr. Madisetti’s opinions—if permitted at all—should be limited to
 27 that sole non-infringing alternative. *See Smart Skins LLC v. Microsoft Corp.*, No.
 28 15-cv-544-MJP, 2016 WL 4148091, at *2 (W.D. Wash. July 1, 2016) (“The

1 relevant case law establishes that Microsoft, the alleged infringer, has the burden of
 2 showing that non-infringing alternatives were both available to it and were
 3 acceptable to its customers during the damages period"); *Conceptus, Inc. v.*
 4 *Hologic, Inc.*, 771 F. Supp. 2d 1164, 1167–68, 1178-79 (N.D. Cal. 2010)
 5 ("Hologic—the alleged infringer—therefore bears the burden of proving the
 6 availability of some other acceptable noninfringing alternative").

7 Third, Dr. Madisetti's "technology background" on the asserted patents will
 8 be, at best, cumulative of what Mr. Stanwood has testified to. "District courts have
 9 broad authority to impose reasonable time limits during trial to prevent needless
 10 presentation of cumulative evidence." *Lutz v. Glendale Union High Sch.*, 403 F.3d
 11 1061, 1070–71 (9th Cir. 2005) (internal citations and quotations omitted). And, at
 12 worst, Dr. Madisetti's "technology background" of the patents is likely to drift into
 13 or outright rely on his excluded benefits opinions. *See* ECF No. 715. Because Mr.
 14 Stanwood, the named inventor of both patents, is more than qualified to address the
 15 "technology background" of his own inventions and because of the high risk of
 16 prejudice to Apple from Dr. Madisetti delving into his excluded "benefits"
 17 opinions, Dr. Madisetti should be excluded from testifying on this topic.

18 Fourth, Apple re-urges its Motion *In Limine* No. 5 to exclude any new
 19 opinions of Dr. Madisetti that Mr. Kennedy relied on in his December 13, 2019
 20 supplemental report for at least three reasons. First, as this Court noted at the
 21 January 16, 2020 Motion *In Limine* hearing, this "me-too kind of testimony where
 22 one expert bootstraps his opinion by saying he talked to another expert and he
 23 agrees. That is generally inadmissible hearsay." MIL Tr. at 11:4-8. Apple agrees.
 24 Mr. Kennedy relied purely on hearsay from Dr. Madisetti, which Apple and this
 25 Court will not hear from Dr. Madisetti until the second he takes the stand. Second,
 26 it is highly prejudicial to Apple to have to wait until Dr. Madisetti takes the stand to
 27 hear what his new and previously undisclosed opinions are on these licenses and
 28 the technologies subject to them. For the first time in Mr. Kennedy's report and

1 then later at his deposition, Mr. Kennedy revealed that Dr. Madisetti had provided
 2 Mr. Kennedy with undisclosed opinions regarding the technology and Wi-LAN
 3 patents that were subject to the Doro, Unnecto, and Vertu licenses. *See* ECF No.
 4 789 at 10. But Dr. Madisetti had never previously opined on any of these licenses.
 5 And Apple has not had an opportunity to depose Dr. Madisetti on those opinions
 6 since Mr. Kennedy's December 13, 2019 report or deposition. Wi-LAN is being
 7 rewarded for its third failed attempt to present an admissible damages case by being
 8 able to withhold crucial opinions from Dr. Madisetti until literally the minute he
 9 takes the stand. Third, these new opinions from Dr. Madisetti directly conflicts
 10 with this Court's prior Order that Dr. Madisetti may only testify "on the issue of
 11 non-infringing alternatives." ECF No. 770 at 2. This Court should stand by its
 12 prior ruling and limit Dr. Madisetti's testimony to—at most—Apple's sole non-
 13 infringing alternative.

14 For the foregoing reasons, the Court should sustain Apple's objections and
 15 exclude Dr. Madisetti's testimony in its entirety as well as any reliance by Wi-
 16 LAN's damages expert, Mr. Kennedy, on any such testimony of Dr. Madisetti.

17
 18 Dated: January 21, 2020

DLA PIPER LLP (US)

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants.

/s/ Sean C. Cunningham
Sean C. Cunningham